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“WORLDLY CORRUPTIONS” AND “ECCLESIASTICAL DEPREDATIONS”: HOW BAD IS AN ESTABLISHED CHURCH?

*Susan M. Gilles**

While American scholars have debated the full ramifications of the Establishment Clause, there is general agreement that at a minimum it bars the government from establishing a church. As Justice Black phrased it:

[The Establishment Clause] means at least this: Neither a state nor the Federal Government can set up a church.¹

This Essay questions the wisdom of such a ban by comparing the United States with England, which, of course, has had an established church since 1534.²

How bad is an established church? Perhaps a better question to ask is what we mean by an established church and why one would prohibit the government from establishing a church — what is the evil that such a ban is designed to prevent?

Inherent in the term “established church” is the presumption of a relationship between the state and a religion. This relationship could have many manifestations: government subsidy of a religion, government control of the doctrine of the religious entity, or the granting of special governmental roles to the religious entity. Examples of special government roles include the right to control or influence legislation, to have a say in government appointments, or to preside over government occasions. This definition of an established church includes both a church that controls a state as well as a state that controls a church.

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1. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1946). While the Court has applied the Establishment Clause to the states through the Fourteenth Amendment under *Everson*, at the time that the First Amendment was adopted, several states had established churches. See *Wallace v. Jaffree*, 472 U.S. 38, 99 n.4 (1985) (Rehnquist, J., dissenting) (noting that state churches were prevalent throughout the late eighteenth and early nineteenth centuries); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 4 (1982).

2. See *infra* note 7 (discussing the establishment of the Church of England).

These conflicting visions of an established church informed the Framers' debate. For instance, Roger Williams feared a union of church and state because the "worldly corruptions" of the state would harm the church.³ Jefferson saw a threat not to the church but to the secular state, which in his eyes had to be protected from "ecclesiastical depredations and incursions."⁴ Madison viewed any concentration of religious and governmental powers as an evil per se.⁵ Moreover, while the Framers were troubled by the very idea of combining church and state, they also feared that any such combination would necessarily lead to discrimination against individuals of other religions or of no religion at all.⁶

Let us examine England's established church and question whether there is any evidence that the Framers' fears were justified. The established church in England today is a very different and seemingly more benign entity than that reviled by the Framers. While England has an established church, the Church of England,⁷ it does not ban any other religion,⁸ or force its citizens to attend the established church. This stands in marked contrast to England's history. At various times, England has banned Roman Catholicism and Quakerism.⁹ Queen Elizabeth I made it a crime not to attend

3. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 816-17 (1978) (citing P. MILLER, *ROGER WILLIAMS: HIS CONTRIBUTIONS TO THE AMERICAN REVOLUTION* 89, 98 (1953)).

4. *Id.* (quoting MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 2 (1965)).

5. *Id.* at 816-17, 819 (citing James Madison).

6. CORD, *supra* note 1, at 6-8.

7. It was a series of acts in the sixteenth century which severed the link between the English church and Rome, and brought the Church of England under state control. Act of Appeals, 1533, 24 Hen. 8, ch. 1 (Eng.); Submission of Clergy Act, 1533, 25 Hen. 8, ch. 19 (Eng.) (requiring the submission of the clergy to the Sovereign); Act of Supremacy, 1558, 1 Eliz., ch. 1 (Eng.). See GEOFFREY R. ELTON, *THE TUDOR CONSTITUTION. DOCUMENTS AND COMMENTARY* 327-461 (2d ed. 1978); MARSHALL M. KNAPPEN, *CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 324-29 (1987). The state's control over the Church today is best illustrated by the Church's own canons: "We acknowledge that the Queen's most excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil." S.H. BAILEY ET AL., *CIVIL LIBERTIES: CASES AND MATERIALS* 343 (1980) (quoting Canon A7, Canon of the Church of England (Canons Ecclesiastical promulgated by the Convocation of Canterbury and York in 1964 and 1969)).

8. A religion may register with the government if it wishes to obtain certain benefits, particularly the right to tax exemptions. Places of Worship Registration Act, 1855, 18 & 19 Vict., ch. 81 (Eng.) (amending prior laws as to the certification and registration of places of religious worship in England).

9. During the reign of Charles II (1660-1685), Parliament passed the Conventicles Act, part of the Clarendon Code, which made most nonconformist religious meetings criminal. Conventicles Act, 1664, 16 Car. 2, ch. 4 (Eng.). By the terms of the Act, those convicted of meeting in groups of five or more persons under the pretense of religion, but not according to the forms of the

Anglican Church services, thus assuring a high rate of church attendance.¹⁰ However, a statute mandating church attendance is not a necessary concomitant of an established church. Nor, I would argue, is an establishment clause needed to strike down state-mandated church attendance, since such a requirement seems the antithesis of any guarantee of free exercise.

While historically England's establishment of one religion was accompanied both by mandatory worship and by a ban on other faiths, neither are essential attributes of an established church.¹¹ England currently has an established church but is also a signatory to the European Convention which guarantees that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.¹²

Anglican Church, were to be imprisoned for three months unless they paid a fine of five pounds. The penalty increased with each conviction, and a third conviction led to transportation or a fine of 100 pounds. *Id.* This banned meetings of both Roman Catholics and Quakers. *Id.* Quakers had been targeted earlier for discriminatory treatment under the Quaker Act, 1662, 14 Car. 2, ch. 1 (Eng.). Later acts followed which sought to rout Catholics from positions of power by requiring oaths of office which included a repudiation of the doctrine of transubstantiation. *See, e.g.*, Test Act, 1672, 25 Car. 2, ch. 2 (Eng.). *See also* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 202 (1985) (discussing the Quaker trials); KNAPPEN, *supra* note 7, at 442-44.

10. Act of Uniformity, 1559, 1 Eliz., ch. 2, § III (Eng.) ("All and every person and persons inhabiting within this realm . . . shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church . . . upon pain of punishment by the censures of the Church, and also upon pain that every person so offending shall forfeit for every such offence twelve pence . . .").

11. The existence of an established church is also not necessarily accompanied by an increased level of religious piety. The results of a 1986 survey by the Independent Broadcasting Authority found that only 9% of Britons would describe themselves as having regular church attendance. Sebastian Poulter, *The Religious Education Provisions of England's Education Reform Act of 1988*, 19 J.L. & EDUC. 499, 513 (1990). This does not compare favorably with the statistics on church attendance in the United States. GEORGE GALLUP, JR. & SARAH JONES, 100 QUESTIONS & ANSWERS: RELIGION IN AMERICA 72 (1989) (basing findings on personal and telephone interviews in 1988 with 2,041 adults nationwide). According to this survey, 40% of Americans attend religious services. *Id.* More recently, an April, 1992, Gallup poll, found that 71% of Americans reported being a member of a church or synagogue, while 41% of Americans had attended religious services in the last week. Anne Cornin, *A Statistical Portrait of the 'Typical American': This is Your Life, Generally Speaking*, N.Y. TIMES, July 26, 1992, § 4, at 5.

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(1) 213 U.N.T.S. 221, 230 [hereinafter European Convention]. The Convention subjects the exercise of these freedoms to "such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." European Convention, *supra*, art. 9(2).

England now seeks to reconcile a guarantee of free exercise for all with an established church.

Some discrimination among religions is, of course, the hallmark of establishing a state church. Because of its status as the established religion, the Church of England enjoys certain powers and suffers certain burdens not placed on other religions.¹³ Perhaps the most famous power is the requirement that the sovereign be a member of the Church of England.¹⁴ Prince Charles could not become a Catholic, nor could he have married a Catholic without relinquishing his claim to the throne. Britain has, however, done away with the requirement that the Prime Minister, the Lord Chancellor, or any public official, be of a particular faith. This was accomplished through a series of statutes, including the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act of 1974,¹⁵ the curiously named Religious Disability Act of 1846 (covering Jews),¹⁶ and the Roman Catholic Relief Acts of 1791 and 1829.¹⁷

The Church of England is also guaranteed twenty-six seats in the House of Lords, Britain's second legislative chamber.¹⁸ A more amorphous, but also more visible privilege enjoyed by the Church of England is what I would call "the exclusive coverage rights" over national events. Whereas in the United States each national holiday

13. By definition an "established" church must enjoy some different rights or obligations or it does not make sense to talk of it as an established church. The privileges of the Church of England are set out in most British constitutional law books. See, e.g., BAILEY ET AL., *supra* note 7, at 341-63; O. HOOD PHILLIPS, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 275-76 (6th ed. 1978) (describing the ecclesiastical prerogatives of the British Crown); 14 HALSBURY'S *LAW OF ENGLAND, ECCLESIASTIC LAW* (4th ed. 1975).

14. The Act of Settlement of 1700 disqualifies from being the Sovereign "all and every person . . . who shall or may take or inherit the said crown . . . and is or shall be reconciled to or shall hold communion with the see or church of Rome or shall profess the popish religion or shall marry a papist." Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2, § 2 (Eng.). Section 3 requires that "whoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established." *Id.* § 3.

15. Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act, 1974, ch. 28 (Eng.).

16. Religious Disability Act, 1846, 9 & 10 Vict., ch. 59 (Eng.) (relieving citizens from certain penalties and disabilities as to religious opinion).

17. Roman Catholic Relief Act, 1791, 31 Geo. 3, ch. 32 (Eng.); Roman Catholic Relief Act, 1829, 10 Geo. 4, ch. 7 (Eng.) (repealing §§ 11 and 17 of the 1791 Act, among other things, to provide relief to Roman Catholic citizens and to reiterate limitations upon such citizens).

18. BAILEY ET AL., *supra* note 7, at 344. The so-called Lords Spiritual comprise the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and twenty-one senior officers of the church. *Id.* See also RODNEY BRAZIER, *CONSTITUTIONAL TEXTS, MATERIALS ON GOVERNMENT AND THE CONSTITUTION* 496-97 (1990) (stating that the Lords Spiritual are archbishops and bishops of the Church of England who have seats in Parliament by ancient usage and by statute).

seems to be sponsored by some commercial entity, in England, by contrast, the Church of England has the "exclusive" right to run national events, the most prominent being coronations,¹⁹ royal weddings, and services commemorating the homecoming of troops. Therefore, the Church of England is guaranteed a high level of visibility by virtue of its status as the established church.²⁰

The Church of England is also subject to state control. For instance, the Queen is the head of the Church and, as advised by her ministers, controls appointments to key Church offices,²¹ although the Church's own recommendations are usually followed. The Queen as the head of the Church also enjoys the right to dictate the doctrine of the Church,²² a power little used in this century.

Thus the established church in England enjoys certain constitutional privileges and suffers certain constitutional controls imposed on no other religion. However, beyond these "discriminations" England is now committed to a principle of nondiscriminatory free religious exercise.

What then of the Framers' fears? Is even this benign form of established church a dangerous combination of powers which must be rejected? Is there evidence that an established church necessarily increases the danger of religious discrimination and intolerance, despite the best intentions? Let us test these fears by looking at England's treatment of religion in the area of education, an area of controversy in England after the passage of the Education Reform Act

19. 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 13, ¶ 433 (granting the Archbishop of Canterbury the exclusive privilege of crowning the sovereign) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *381).

20. One extraordinary result of the Church of England's position as an established church is that only the Christian faith, perhaps only the Anglican creed, is protected by the law of blasphemy. *Regina v. Lemon* [1979] 1 All E.R. 898, (holding that blasphemous libel is established by proving an intention to publish material that is in fact blasphemous to Christianity, even if not intended to be blasphemous); *Regina v. Chief Metro. Stipendary Magistrate, ex parte Choudhury* [1991] 1 All E.R. 306 (holding that extending the law of blasphemy to protect other religions, such as Islam, would be "virtually impossible by judicial decision").

21. Appointment of Bishops Act, 1533, 25 Hen. 8, ch. 20, § 3 (Eng.). See also BAILEY ET AL., *supra* note 7, at 344.

22. The Church may adopt "canons" that cannot be contrary to state law and require Royal Assent to be law. Submission of Clergy Act, 1534, 25 Hen. 8, ch. 19, § 3 (Eng.) (providing that no canons shall be enforced contrary to the Sovereign's prerogative). The Church may also adopt "measures" that become the law of the land but must be passed by the Houses of Parliament and receive Royal Assent. Church of England (Assembly) Powers Act, 1919, 9 & 10 Geo. 5, ch. 76 (Eng.); Synodical Government Measure, 1969, No. 2, § 1 (Eng.). See BAILEY ET AL., *supra* note 7, at 344.

of 1988.²³ Conveniently, education has also been a focus of constitutional challenges in the United States and therefore provides a useful vehicle for assessing the need for an establishment clause.

In pre-World War II England, the Church of England ran the educational system for the most part. However, at about the time the Church of England was experiencing financial problems from running the schools, the new welfare state became interested in providing public education.²⁴ The result was the enactment of the 1944 Education Act (1944 Act).²⁵ The 1944 Act enabled religious bodies to elect to receive government funding in exchange for relinquishing varying degrees of control over their schools.²⁶

Essentially, the government gave the religious institutions who desire government funding two options.²⁷ First, if a religious institution wished to receive total government funding, the institution must give up almost all control of the school, thus becoming a "controlled school."²⁸ However, for less government funding, a religious institution could become an "aided school."²⁹ Currently the government funds all operating expenses of "aided schools," but only 85% of the cost of any capital improvements.³⁰ Despite this high level of government funding, the religious institution retains almost full control over the aided school. In particular, the religious body appoints a majority of the governors and retains substantial control over hiring, curriculum, and the content of religious education and religious worship.³¹ Most of the religious institutions running schools at this

23. Education Reform Act, 1988, ch. 40 (Eng.). This Essay relies heavily on the leading commentary on the 1988 Act by Sebastian Poulter. Poulter, *supra* note 11.

24. Poulter, *supra* note 11, at 499-500; see also WILLIAM R. CORNISH & GEORGE DE N. CLARK, LAW AND SOCIETY IN ENGLAND 1750-1950, at 479 (1989) (discussing the planning and purpose of the 1944 Act).

25. Education Act, 1944, 7 & 8 Geo. 6, ch. 31 (Eng.).

26. *Id.* §§ 14-22. Sections 25 through 30 of the 1944 Act introduced the concept of mandatory religious education and worship now contained in the 1988 Education Reform Act. See *infra* notes 40-59 and accompanying text.

27. Education Act, 1944, §§ 14-22. A third, but little used, option was to become a "special agreement school." *Id.* § 15(1).

28. *Id.* §§ 15, 17-19, 20, 22-24. In these schools, the religious entity technically retains ownership of the school, but its only real influence on the running of the school is a right to appoint a minority of the school's board of governors. *Id.* §§ 17-19.

29. *Id.* § 15.

30. Poulter, *supra* note 11, at 500. The 1944 Act originally offered only 50% funding for capital improvements. Education Act, 1944, §§ 15, 102-105. This level has been increased by various acts over the decades. 15 HALSBURY'S LAWS OF ENGLAND, EDUCATION, *supra* note 13, ¶¶ 176-178.

31. Education Act, 1944, §§ 18(3)(b), 19(2)(b) (board of governors), 23(2) (curriculum), 24(2) (hiring), 25 and 28 (religious worship and education). All schools were subjected to govern-

time opted to become "aided schools."³² Although the 1944 legislation was prompted by the problems the established church was experiencing, the opportunity to receive government funds was not limited to the Church of England. About two-thirds of the government-funded religious schools are institutions of the Church of England. The remaining one-third are Roman Catholic, and a handful are Jewish.³³ Thus, a parent in England can elect to send her child to a government-funded nonreligious school (in America a "public school")³⁴ or a government-funded religious school.

Any system of government-funded religious schools would be barred in the United States by the Establishment Clause,³⁵ even if it did not discriminate between religions. The English system thus illustrates some of the more innovative options which are opened up by the absence of an establishment clause. Moreover, the system does offer individuals the option of a free religious education, an enhancement of free exercise unknown in the United States. However, a closer look at some of the problems of the English system may illustrate that the Framers correctly foresaw the evils of even a benign establishment of religion.

First, while the English system purports to be nondiscriminatory between religions, the only government-funded religious schools are

ment inspection to ensure compliance with certain minimum educational standards. *Id.* § 77.

32. According to Poulter, current government statistics show that there are 3,000 controlled schools and 4,300 aided schools. Poulter, *supra* note 11, at 500-01 (citing the Statistics of Schools 1988, 129 (1989)).

33. *Id.* at 500. In Scotland in 1980, of a total of 457 government-funded religious schools, 450 were Roman Catholic, 6 were Episcopalian, and 1 was Jewish. KEITH D. EWING & WILSON FINNIE, CIVIL LIBERTIES IN SCOTLAND: CASES AND MATERIALS 215 (1982).

34. These public schools, called "county schools," are owned and operated by the local authorities. Poulter, *supra* note 11, at 500. About 78% of pupils in government schools attend these schools. Even "public schools" in England are not nonreligious because both religious education and worship are statutorily mandated. *See infra* notes 44-47 and accompanying text (discussing the religious education requirements under the Education Reform Act, 1988).

35. The United States Supreme Court differentiates between aid to religious schools and aid to students who attend religious schools. *TRIBE*, *supra* note 3, § 14-9, at 842. *See also* *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (upholding a Maryland statute authorizing the payment of state funds to institutions of higher learning which do not award "only sectarian or theological degrees" even though four eligible colleges were affiliated with the Roman Catholic Church); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (establishing the three part establishment test: the state aid (1) has a secular purpose, (2) a primary effect other than the advancement of religion, and (3) does not tend to excessively entangle the state in church affairs); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (holding that the New Jersey law allowing reimbursement of bus fares to parents of children attending parochial schools does not constitute a contribution nor support of the school and thus was not a violation of the First Amendment). Thus, direct aid to the schools is not permissible, while many forms of aid to the students attending religious schools have withstood Establishment Clause challenges.

of mainstream religions. Mormons do not have funded schools.³⁶ The Church of Scientology does not have funded schools.³⁷ Perhaps the real test of the English system will be the government's reaction to requests for funding of Islamic schools by England's growing Islamic population.

A second problem that the Framers feared was that political disputes would take on a religious, and thus potentially more divisive air, if state entanglement with religion was permitted. In England, with the existence of government-funded religious schools, issues such as teachers' pay, class size, and building maintenance all take on a religious character. Another problem with government-funded religious schools, which is harder to substantiate, is the potential increase in religious bigotry. For example, many students who attend Church of England schools never meet Roman Catholics, and vice versa. Such segregation and the ignorance it breeds seem guaranteed to increase bigotry.³⁸

Finally, in practice the English system does face free exercise problems. In certain circumstances, parents may have no choice as to the school that their child will attend. For instance, in 1972 a local authority found that all its slots in public secondary schools were filled. It therefore sent a circular to the parents of all children moving from primary to secondary schools stating that all children attending Roman Catholic primary schools must attend Roman Catholic secondary schools. Thus, the parents had no choice but to send their children to Roman Catholic secondary schools.³⁹ Government-funded religious schools, therefore, represent an option which would not be available under an establishment clause, but an option that may well come with a price that the Framers would not be willing to pay.

A more telling criticism of religious freedom in the English educational system focuses on the requirements for religious education

36. Poulter, *supra* note 11, at 500-01.

37. *Id.*

38. Those who support the 1988 Act would argue that its requirement of religious education exposes children to other faiths, thus decreasing bigotry. *Id.* at 514.

39. The local authority's action was upheld despite a legal challenge from several parents who alleged that the action was unreasonable and beyond the authority's power. *Cumings v. Birkenhead Corp.*, 1972 Ch. 12 (Eng. C.A.) (rejecting parents' claims of violations of sections 68, 76, and 99 of the Education Act of 1944). Although parents who are in this situation may have their child exempted from participation in religious education classes and worship, as is discussed below, the child will be exposed to the prevailing religious climate in the school. See *infra* notes 55-59 and accompanying text (discussing the opt-out provisions).

and worship. The 1988 Education Reform Act (1988 Act) mandates religious education and religious worship in all schools.⁴⁰ Originally the 1988 Act was intended simply to introduce a national curriculum, setting common educational goals in mathematics, science, etc., throughout the country.⁴¹ However, while the 1988 Act was pending in the House of Lords, several conservatives proposed that the Act be amended to require that all schools provide a predominantly Christian education.⁴² This proposal was opposed by, among others, the Church of England, and it was the Church's proposed compromise which was enacted into law.⁴³

Religious education is required in every school.⁴⁴ In the government-funded religious schools the content of the religious education class is largely determined by the religious body itself;⁴⁵ but in public schools, the content of the class is determined by an agreed syllabus.⁴⁶ The law had always required some form of religious education even in public schools. The controversial change brought about by the 1988 Act was the requirement that the public schools' religious education syllabus shall reflect the fact that the religious traditions in Great Britain are mainly Christian, while taking into account the teachings and practices of the other principal religions

40. Education Reform Act, 1988, ch. 40, §§ 2, 6-9, 84-88. The requirement for both religious worship and religious education in all schools was first introduced in the 1944 Act. Education Act, 1944, §§ 25-30. However, the practice had been silently abandoned in many schools and was considered an outdated relic until the requirements were revised and strengthened by the 1988 Act. BAILEY ET. AL., *supra* note 7, at 348; Poulter, *supra* note 11, at 502-09 (concerning the widespread disregard of the provisions of the 1944 Act).

41. Poulter, *supra* note 11, at 501. Overall, the 1988 Act shifted much of the control over schools from local authorities to central government. Education Reform Act, 1988, §§ 1, 4. The Act also created a new class of schools, "grant maintained schools," to be run by central government alone. *Id.* §§ 3-4, pt. 1, ch. V; *see also* Poulter, *supra* note 11, at 501.

42. Poulter, *supra* note 11, at 502-03.

43. For a full account of this debate, *see id.* at 502-03.

44. Education Reform Act, 1988, § 2(1) ("The curriculum for every maintained school shall comprise a basic curriculum which includes . . . (a) provision for religious education for all registered pupils at the school . . ."). *Id.* § 8. The only exceptions are nursery schools. *Id.* § 25(2). The 1988 Act is not applicable to Scotland or to Northern Ireland, except for a few provisions not relevant to this discussion. *Id.* § 238.

45. In aided schools, the board of governors (a majority of whom are appointed by the religious entity) determines the content of religious education classes. Education Act, 1944, § 28 (as amended by the 1988 Act, Schedule 1). The controlled schools must use the local authorities' agreed syllabus unless parents request that the classes be conducted as set out in the foundation deed or as practiced prior to the school becoming controlled. *Id.* § 27 (as amended by the 1988 Act, Schedule 1).

46. *Id.* §§ 26-28 (as amended by the 1988 Act, § 8 and Schedule 1). Poulter, *supra* note 11, at 506.

represented in Great Britain.⁴⁷

The syllabus is drawn up for each school district by regional conferences made up of representatives of four interests, each of which have one vote.⁴⁸ The four interests are the local authority, the teachers' union, the Church of England, and all other religions, who share the remaining fourth vote.⁴⁹ Any syllabus must be approved unanimously,⁵⁰ which has the effect of giving the Church of England a veto over the contents of the syllabi used in all public schools.

The 1988 Act also includes a requirement that every day, all schools must conduct an act of collective religious worship.⁵¹ While government-funded religious schools can choose the content of their daily worship,⁵² the public schools are required to conduct a ceremony that is "wholly or mainly of a broadly Christian character."⁵³ The Act defines being of "a broadly Christian character" as worship which "reflects the broad traditions of Christian belief without being distinctive of any particular Christian denomination."⁵⁴

Both the requirements of collective Christian education and collective Christian worship in the public schools do contain opt-out provisions. The opt-out provisions allow parents to request that their child be excused from religious education and/or worship.⁵⁵ There is also a provision for an entire school or group of students at a school to opt out of collective Christian worship. Under this provision, the school must demonstrate that the character of its student body makes Christian religious worship inappropriate.⁵⁶ However, advi-

47. Education Reform Act, 1988, § 8(3). The syllabi "shall reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religions represented in Great Britain." *Id.* As Poulter points out, this language is riddled with vagaries: what are the other "principal religions?" Poulter, *supra* note 11, at 507-08. How do you "take account" of other religions in conducting a class? *Id.*

48. Education Act, 1944, § 29 and Schedule 5 (as amended by the Education Reform Act, 1988, § 8(3) and Schedule 1, ¶ 7).

49. Education Act, 1944, § 29.

50. *Id.* If no agreement is reached, the Secretary of State can appoint his own committee to draw up a syllabus. *Id.* Schedule 5, ¶¶ 10, 11, & 13.

51. Education Reform Act, 1988, § 6(1) ("[S]ubject to Section 9 of this Act, all pupils in attendance at a maintained school shall on each school day take part in an act of collective worship."). The requirement of religious worship was originally imposed by the 1944 Act. Education Act, 1944, § 25.

52. Education Reform Act, 1988, § 6(3)(b).

53. *Id.* § 7.

54. *Id.* § 7(2). As Poulter observes, the language chosen, "of a broadly Christian character," is inherently vague. Poulter, *supra* note 11, at 510-11. Does this allow 51% of mornings to start with Christian worship, and the remainder with Muslim prayers?

55. Education Reform Act, 1988, § 9(3).

56. *Id.* § 12.

sory committees, which have the unfortunate acronym SACRED (Standard Advisory Committees for Religious Education), determine whether the school will be permitted to opt out.⁵⁷ The SACRED committee has the same membership as the syllabus conferences mentioned above⁵⁸ and thus, once again, the Church of England retains substantial control over religion in school.⁵⁹ Not surprisingly, the 1988 Act has caused outrage among the Muslim population who predominantly attended public schools and has led to an increased demand that the government fund Islamic religious schools.

What then are the lessons from the English system? As Montesquieu pointed out, it is always "un grand hazard" to draw any conclusions from a comparative study given the geographical, sociological, economic, cultural, and political differences that exist between countries.⁶⁰ However, there are fewer dangers in this scenario given that "the image of an establishment that continued to dominate in the minds of Americans during the revolutionary period was one modeled on the Anglican establishment in England."⁶¹

Even if we put aside such concerns, the lesson is mixed. The absence of an establishment clause does provide a freedom to experiment, for instance, with government funding of religious education. And as a result of this, the free exercise of many may in fact be promoted.⁶² However, the Framers seemed correct when they assumed that such a system bore a high price. Roger Williams's fear

57. *Id.* A school granted opt-out permission must still conduct collective worship, but it need not be of a "Christian character." *Id.* § 7(6); see also Poulter, *supra* note 11, at 511-12.

58. See *supra* notes 48-50 and accompanying text (discussing the public school syllabus).

59. Education Reform Act, 1988, § 11.

60. See O. Kahn-Freund's classic article on comparative law, *On the Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6-17 (1974) (quoting from MONTESQUIEU, *ESPRIT DES LOIS*, Book I, Ch. 3 (*Des lois positives*)).

61. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 191-92* (1986).

62. Outside the area of education there are other examples of a sensitivity to free exercise concerns. For instance, the conscientious objector laws that were in place in Britain during World War II allowed an exemption to anyone who "claim[ed] that he conscientiously object[ed]; a. to being registered in the military service register; b. to performing military service; or c. to performing combat duties." National Service (Armed Forces) Act, 1931, 2 & 3 Geo. 6, ch. 81, § 5(1) (Eng.). More recent examples abound. For instance, the Road Traffic Act, 1988, ch. 52, § 17(2) exempts Sikhs from a general requirement that all motorcyclists wear helmets because their religious beliefs dictate that they wear turbans. The Slaughter of Poultry Act, 1967, ch. 24, § 1(2) (Eng.), and the Slaughterhouses Act, 1974, ch. 3, § 36(3) (Eng.), exempt Jewish and Muslim slaughterhouses from general animal cruelty provisions. Thus, in the area of free exercise, Britain has not done too poorly *without* an explicit free exercise clause and *with* an established church.

that the church would be harmed if the state was permitted to intervene in religious matters⁶³ seems borne out by the state's assertion in the 1988 Act of the right to dictate the content of religious education and religious worship in schools. It is a government committee, not the Church itself, which determines the content of religious education in public schools. The 1988 Act seems also to confirm Jefferson's fear of church incursion into state matters. It was the Church of England which played a crucial role in the drafting of the 1988 Act, and the Act itself ensures the Church a pivotal role in its application.

However, whether one views the 1988 Act as evidence of the established church's control over the state, or as evidence of the state's co-option of religion, it well illustrates the impact that such a union can have on the rights of minority religions and nonreligious individuals. England's experience suggests that once the state is allowed to fund religious education, discrimination against minority religions, even if avowedly benign, follows both in terms of opportunities to establish religious schools and in terms of the religious worship and education required at even public schools. Perhaps then the clearest lesson that England can provide is that the existence of even a benevolent established church in a country purporting to support free exercise for all can gravely impinge on the religious freedoms of others.

63. See *TRIBE*, *supra* note 3, § 14-3, at 816-17.